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# COMMENTS OF GOVERNMENTS ON THE REPORT OF THE WORKING GROUP ON A DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT

Addendum

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## COMMENTS RECEIVED FROM MEMBER STATES

### PANAMA

[Original: Spanish]

[8 March 1994]

The Panamanian Government agrees to the elimination of international traffick in narcotic drugs and massive violations of human rights from the list of crimes contained in the draft Code of Crimes against the Peace and Security of Mankind, as these topics are amply covered by international treaties, and as specialized bodies have already assigned working groups to them; this is true of the inter-American system for the protection of human rights established by the Organization of American States, as well as the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.

With regard to the establishment of the tribunal, the Panamanian Government believes that the draft articles do not fully meet the aspirations of Member States for the establishment of such a tribunal, because they do not offer guarantees of a supranational tribunal, restrict access in terms of working languages (see article 18), and do not clearly resolve cases in which the acceptance by States of the court's competence to prosecute crimes against the peace and security of mankind involves only the consent of the affected State and not of the aggressor State, so that simple non-ratification by the State which does not accept the court's competence can render the implementation of sanctions ineffective.

The foregoing notwithstanding, in view of the work accomplished by the Commission up to now, the Panamanian Government trusts that legal mechanisms of understanding and consensus will be found so that the current difficulties and obstacles can be overcome.

The Panamanian Government is of the view that the elaboration of such rules requires the broadest range of scientific and political opinions which can harmonize the views of Member States to the greatest possible extent.

### SLOVENIA

[Original: English]

[28 February 1994]

The Republic of Slovenia supports the establishment of an international criminal court on the basis of the statute as its constituent document. That would not necessarily require an amendment to the Charter of the United Nations. We favour the idea that the court be linked to the United Nations, but it would not need to be its organ.

Consequently, the Republic of Slovenia supports the composition of the tribunal, as envisaged in the draft statute, including the establishment of the procuracy as a separate organ of the court.

Concerning the rules of the tribunal stipulated in article 19 of the draft statute, the Republic of Slovenia favours the idea that the basic procedures concerning the rules of evidence to be applied in the trial be rather the subject-matter of the statute than of the rules of the tribunal itself, a position also expressed by some members of the Working Group. In order to guarantee the complete independence of the procuracy in relation to the court, the procuracy should be governed by its own internal rules.

The Republic of Slovenia expresses the opinion that part 2 on jurisdiction and applicable law is the core issue of the present draft statute.

In principle, the Republic of Slovenia supports the treaty-enumeration approach to crimes, defined by these treaties, as the basis of the jurisdiction ratione materiae of the court, as laid down in article 22 of the present draft. Thus can the application of the principle nullum crimen sine lege be most properly preserved.

Besides, the Republic of Slovenia notes with satisfaction that the grave breaches of Protocol I, additional to the Geneva Conventions of 1949 and relating to the protection of victims of international armed conflicts of 8 June 1977, have been listed among the crimes covered by article 22 of the present draft. It is true that the two Additional Protocols of 1977 to the Geneva Conventions of 1949 have not been as universally accepted as the Conventions themselves. Nevertheless they have been by now ratified by two thirds of all States and may soon, if not yet, be tested as the customary source of international humanitarian law. Therefore, the position expressed in the commentary of the Working Group that Protocol II of 1977 to the Geneva Conventions of 1949 and relating to the armed conflicts of non-international character was left outside the scope of article 22 for the reason that it contained no provision concerning grave breaches, is not convincing. Protocol II contains under its part II very clear provisions as to which acts are and shall remain prohibited at any time and in any place whatsoever and may prima facie be characterized as serious violations of humanitarian law. Drafters of the draft statute of an international criminal court should bear in mind that the most brutal and massive violations of humanitarian law and human rights are one of the most evident features of armed conflicts which are not of an international character.

The Working Group decided to put in the first strand of the court's jurisdiction ratione materiae the anti-terrorist conventions of a universal character that qualify specific terrorist acts as grave crimes and oblige their State Parties to act according to the rule aut iudicare aut dedere.

Here the Republic of Slovenia suggests to the Working Group to reconsider whether terrorist international crimes can be put on the same footing with war crimes and crimes against humanity in respect of the gravity of their criminality. Certain legal distinction between the two groups of crimes in question can already be drawn. We must bear in mind that the most serious war

crimes and crimes against humanity are not the subject of the statutory limitation, as stipulated in the Nürnberg principles and put down in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity of 1968. Secondly, terrorist crimes are to be treated in the domestic legislation as classical non-political crimes in order to fit into already existing bilateral extradition agreements. On the other hand, war crimes and crimes against humanity are to be prosecuted by domestic courts on the basis of the principle of universality.

The list of anti-terrorist conventions could be supplemented with the Protocol to the Montreal Convention of 1973 for the Suppression of Unlawful Acts against the Safety of Civil Aviation which extends the scope of this Convention to the terrorist acts committed at international civil airports.

The Republic of Slovenia in principle agrees that drug-related crimes fall within the subject-matter of the jurisdiction of an international criminal court but the Working Group should re-examine whether drug-related crimes should fall within the group of crimes which require a special acceptances of jurisdiction according to article 26 of the present draft.

As a State Party to the Convention against the Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984, the Republic of Slovenia supports the position that this Convention too is included among the treaties that fall within the jurisdiction of an international criminal court.

Bearing in mind the acceptance by States of the jurisdiction over crimes listed in article 22 of the present draft statute, the Republic of Slovenia favours the "opting in" system, by which the jurisdiction is not conferred automatically for the States Parties of the statute, but requires the additional acceptance of a special declaration.

As many other United Nations Member States, the Republic of Slovenia must express a reservation against the territorial scope of the jurisdiction of the court in relation to its own nationals, who by our Constitution cannot be surrendered for trial outside the country.

As we come to the second strand of the jurisdiction <u>ratione materiae</u> of an international criminal court as laid down in article 26 of the present draft statute, for which a special acceptance of the jurisdiction is required, the delegation of the Republic of Slovenia cannot accept the position of the Working Group that war crimes and crimes against humanity that are not enlisted in the Genocide Convention, and not in the Geneva Conventions of 1949 and its Protocol I be separated from the crimes envisaged in the said Conventions and put under the special acceptance of a jurisdiction clause. The Working Group obviously had in mind international crimes which had their basis in the customary international law, such as The Hague Convention (IV) Respecting the Laws and Customs of War on Land, 1907, and the Regulations annexed thereto, the Charter of the International Military Tribunal, 1945, and the Common Article 3 of the 1949 Geneva Conventions, and applying to internal armed conflicts. Here, the ILC should follow the approach of the Statute of the ad hoc International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former

Yugoslavia since 1991, which unconditionally covers the said crimes under its subject-matter jurisdiction.

Predetermination of the act of aggression by the Security Council as envisaged in article 27 of the present draft statute is, in the opinion of the Republic of Slovenia, in contradiction with the principle of independence of the judiciary and should be reconsidered most carefully by the Working Group.

The provision on the applicable law in article 28 of the draft statute in our view does not suffice to follow the principle nullum crimen sine lege and should be reconsidered accordingly.

In respect of the jurisdiction ratione personae the future court will have its jurisdiction over natural persons on the basis of individual criminal responsibility. Here, in the opinion of the Republic of Slovenia, the draft statute needs further elaboration with regard to the responsibility of governmental officials, crimes committed on an order of the superior and other related questions.

The Republic of Slovenia believes that one of the fundamental questions concerning the efficient international judicial system is the question how to bring the suspected or the accused perpetrator of the alleged crime to the court. In this respect, it must be noted that the Constitution of the Republic of Slovenia does not permit a trial in absentia.

Pending the trial, the procedural standards as laid down in article 14 of the International Covenant on Civil and Political Rights of 1966 must be respected. The Republic of Slovenia suggests that more care should be devoted to victims and witnesses at the court.

As regards the applicable penalties, the Republic of Slovenia notes with satisfaction that there is no capital punishment envisaged since in Slovenia it is prohibited by the Constitution. The legal system of the Republic of Slovenia does not envisage life imprisonment either and it should be, in the view of the Republic of Slovenia, substituted with a maximum term of imprisonment.

The age of the perpetrator of an international crime cannot be solely taken into account as an aggravating or mitigating factor. The Working Group should decide whether the juvenile perpetrators, i.e. under the age of 18 according to the well-established international standards, will take a stand at an international criminal court.

The Republic of Slovenia does not oppose the possibility that the prosecutor, too, may submit an appeal against or apply for the revision of the judgement of an international criminal court. However, if these rights are granted to the prosecutor, it must be carefully foreseen by the statute of the court in which cases the sentence may be altered and whether a more severe judgement may at all be promulgated, should the circumstances of the case so require.

Finally, the Republic of Slovenia suggests that the International Law Commission (ILC) continues its work on the draft statute of an international criminal court as an urgent matter.

## SRI LANKA

[Original: English]

[15 March 1994]

General comments

The Government of Sri Lanka is of the view that an international criminal court, in order to command the widest possible international confidence and acceptance, which it must necessarily enjoy in order to discharge the onerous responsibilities to be entrusted to it, must be established as an impartial judicial institution committed to upholding the rule of law and administering justice free from any taint of political considerations. The court would often be called upon to adjudicate on complex legal issues which may also involve a substantial element of political sensitivity. It is essential that, in the performance of its functions, the court pay due regard to the principles of sovereignty, territorial integrity and political independence of States as enshrined in the Charter of the United Nations.

The Government of Sri Lanka wishes to commend the International Law Commission and members of the Working Group on a draft statute for an international criminal court on the pragmatic and flexible approach adopted in the formulation of the draft articles. However, there are several matters of substantial political, legal and practical difficulty which need to be addressed and satisfactorily resolved before wide acceptance of the statute could be assured.

Specific comments

### PART I. SUBSTANTIVE ISSUES

#### 1. Relationship of the court to the United Nations

The Government of Sri Lanka is of the view that the establishment of an international criminal court, either as a principal or a subsidiary organ of the United Nations would be impractical. It is of the view that there does not at the present stage appear to be a sufficiency of support within the international community for an international criminal court to be established with the status of a principal or subsidiary organ of the United Nations and requiring for such purpose such a major undertaking as an amendment of the Charter. However, the Government of Sri Lanka recognizes the importance of a formal linkage with the United Nations in order to ensure that the institution is vested with the requisite authority for the exercise of international criminal jurisdiction and to generate the confidence of the international community. This could be achieved through the conclusion of a multilateral treaty under the auspices of

the United Nations. This would enable the court to have a close cooperative relationship with the United Nations, while maintaining a separate status.

2. Organs of the tribunal

It is noted that the term "Tribunal" is used in the draft statute to include the court, the registry and the procuracy. While appreciating the reasoning of the Working Group that for conceptual, logistical and other reasons the three organs had to be considered in the draft statute as constituting an international judicial system as a whole, the Government of Sri Lanka wishes to stress the importance of ensuring the independence which must necessarily exist between the judicial and prosecutorial branches of an international judicial system.

In terms of the statute the procuracy will be in charge of the investigations, the institution of proceedings and the conduct of the prosecution. In relation to these functions the procuracy should have independent authority. No doubt the tribunal will have the power to examine and rule on the exercise of such authority at relevant stages. However, the exercise of the functions stated should not be under the direction of the tribunal.

3. Jurisdiction of the tribunal

The Government of Sri Lanka is of the view that the provisions in part 2 of the draft statute relating to jurisdiction and applicable law, which constitute the core provisions of the statute, raises a number of legal issues which require further examination by the Commission.

(i) The question arises whether there are adequate reasons for the separation presently made in the crimes referred to in article 22 and those referred to in article 26 (2) (b), i.e., the distinction made between primary and secondary strands of jurisdiction. The Government of Sri Lanka is of the view that the jurisdiction of the proposed court must, at least initially, be confined to crimes established under multilateral treaties enjoying a wide degree of international acceptance. It is noted in this context that the list of agreements in article 22 covers such international treaties and these define specific acts which are required to be considered as serious crimes and create an "extradite or prosecute" regime in respect of such crimes.

With regard to the crimes defined under the Montreal Convention on the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971 (article 22 (d)), consideration should be given to the extension of these provisions to include unlawful acts against airports and civil aviation facilities (as distinct from unlawful acts against aircraft) covered under the 1988 Protocol to the 1971 Montreal Convention.

The Government of Sri Lanka is also of the view that the 1988 United Nations Convention against drug trafficking should be dealt with in article 22. The growing linkage between narcotic trafficking, acts of terrorist groups and

the illicit arms trade pose an ever-increasing threat to peace and security within and among nations in many parts of the world. This phenomenon demands that the international community treat these activities as grave crimes under international law.

Furthermore, the provisions of the 1988 United Nations Convention, as in the case of those Conventions listed under article 22, create an "extradite or prosecute" regime in relation to drug-related offences and provides for the exercise of extraterritorial jurisdiction in respect of such offences, where extradition is not granted. These factors would justify the 1988 United Nations Convention being treated on a par with other multilateral treaties under article 22.

With regard to the category of crimes referred to as "crimes under general international law" under article 26 (2) (a), the Government of Sri Lanka is of the view that these provisions lack the standard of exactitude and specificity which must be present before vesting the court with jurisdiction. The Government of Sri Lanka therefore wishes to reiterate that the jurisdiction of the proposed court must at least initially be confined to crimes under multilateral treaties.

(ii) On the question of the court's jurisdiction, it is noted that the draft statute as presently formulated is concurrent and not exclusive, preserving the inherent right of a State party either to try an accused before its national courts or to refer the accused to the international criminal court. The Government of Sri Lanka is in agreement with this approach which is a logical extension of the "extradite or prosecute" regime incorporated in the treaties listed in article 22. Such a regime could help to fill a jurisdictional vacuum which could well arise where a requested State refuses to extradite its own nationals and the requesting State clearly has no trust or confidence in the judicial system of the requested State.

Moreover, the concurrent jurisdiction of the court is made subject to the consent of States, i.e., the State in which the crime had been committed and the State of which the perpetrator of the crime is presumed to be a national.

The draft statute provides in article 23 for specific acceptance of the "subject-matter" jurisdiction of the court by each State party to the statute. Of the two alternatives suggested, the Government of Sri Lanka would support the "opting-in" procedure in alternative A, which is in consonance with the consensual basis of the court's jurisdiction.

(iii) Article 25 of the draft statute, which provides that cases pertaining to crimes referred to in article 22 or article 26 (2) (a) may be submitted to the court "on the authority of the Security Council", requires further examination.

It is unclear under the present provisions whether the "authority" purported to be vested in the Security Council would be subject to the same conditions regarding consent as would apply to the submission of cases to the court by a State. The vesting of such authority in the Security Council alone without it also being vested in the General Assembly would prejudice the general acceptability of the statute and make any agreement on this issue elusive.

The Government of Sri Lanka is of the view that it would be prudent to restrict, at least in its initial phase, the right to refer cases to court only to States parties.

In any event, it seems reasonable to assume that if the court is to be established as a viable institution for the exercise of international criminal jurisdiction, the statute would require the widest possible adherence of States. Thus a case could be submitted to the court by one or more States pursuant to a decision taken by the Security Council.

4. Consistency between obligations of States under the statute and obligations under national law and treaties

The provisions of articles 24 and 26 requiring that before a case is submitted to the tribunal, a State otherwise having domestic jurisdiction over a case or over an accused in the case, present in its territory, should agree to the submission of the case to the court, seem directed to the objective of ensuring that there is consistency between, on the one hand, the proposed obligations of States under the statute and, on the other, requirements under their national laws and treaties. The validity of such an objective is unquestionable.

However, the present, somewhat involved provisions of the draft statute raise several issues of substantial complexity, which require further examination. Particular mention must be made in this context of the provisions of article 63 on the surrender of an accused person to the tribunal.

The article requires a State party which has accepted the jurisdiction of the court with respect to a particular crime to take immediate steps to arrest and surrender an accused to the court. A State party which is also a party to the treaty in question which defines the particular crime but has not accepted the court's jurisdiction is required either to surrender or prosecute the accused. The article also requires that a State party should, as far as possible, give priority to a request from the court for the surrender of an accused, over a request for extradition from other States.

The question of pre-existing treaty obligations to extradite devolving on a State party to the statute, vis-à-vis a State which is not a party to the statute, in a situation where there is a competing request from the court, requires further examination.

The multilateral treaties defining the crimes set out in article 22 create an "extradite or prosecute" regime between the States parties to these treaties. Considerable difficulties, legal as well as political, could well arise where a State party to one of these multilateral treaties which is not a State party to the statute of the court makes a request for extradition from a State which is a party both to the statute and to the multilateral treaty. It must also be noted that, except for the 1948 Genocide Convention and the 1973 Apartheid Convention, the multilateral treaties referred to in articles 22 and 26 did not provide for the submission of a case to an international criminal court. Article 63

attempts to extend the "extradite or prosecute" regime by analogy to cover the case of the surrender of an accused to court.

This is a question which requires further examination, paying due regard to the relevant provisions of the Vienna Convention on the Law of Treaties (1969) on modification of treaties. Particular care should also be taken to ensure that provisions of the statute do not prejudice the legal regime created through bilateral extradition treaties.

## PART II. PROCEDURAL ISSUES

### 1. Investigation and preparation of the indictment (article 30)

This draft article refers to the receipt of the complaint by the prosecutor.

It is recommended that the complaint be received by the procuracy division, where a decision will be made as to whether an investigation should be carried out or not. This is comparable to a situation when information is received in respect of the commission of a crime which is cognizable by the court.

The discretion granted to the prosecutor to decide whether an investigation shall be launched or not is in line with the performance of his duties. However in the matter of the review of his decision initially, on finding that there is sufficient basis, the direction to the prosecutor should be to commence investigations, and not to commence a prosecution.

At the conclusion of such investigation as directed by the Bureau, it will be the duty of the prosecutor to decide whether an indictment should be framed against the suspect. A decision of the prosecutor not to prosecute may be reviewed at the instance of the complainant party. However, it will be advisable for the Bureau to have a preliminary inquiry without the participation of the parties concerned, subject to a hearing in exceptional situations. In the absence of exceptional circumstances, the decision of the prosecutor not to indict should not be made subject to review. This observation is made having regard to practical reasons. No doubt the prosecutor should in the exercise of his power not to indict act with great caution. The system will not be satisfactorily operative in the event of a direction to indict when the prosecutor is not willing to do so.

### 2. The indictment (article 32)

This draft article provides for a review of the indictment. This provision appears to undermine the position of the prosecutor. It also appears to provide for an inquiry within an inquiry. It also does not appear to coincide with the earlier provisions which provide for a direction issued by the Bureau on the prosecutor to indict.

The institution of the prosecutor must be organized in such a way as to ensure that indictments are forwarded in only fit and proper cases.

### 3. Disputes as to jurisdiction (article 38)

It may be provided that objection to the jurisdiction of the court be taken prior to the commencement of the trial and not after the accused has pleaded to the indictment. Challenges to jurisdiction at any other stage result in loss of time and energy for no purpose. Only those with a direct interest in the case should have the right to challenge the court's jurisdiction.

The question of jurisdiction, since it goes to the root of the matter, should be decided at a pre-trial stage by a chamber set up to hear the case.

### 4. Evidence (article 48)

Matters of relevancy, admissibility and value of evidence should be left to be decided by the court. There are basic principles applicable in respect of admissibility of evidence.

Illegal means adopted to obtain evidence should be taken into account in considering whether such evidence should be admitted or not. In certain situations some evidence may be admitted but the court may decide not to attach value to such evidence. It should be left to the court's discretion for good reason to decide whether or not to admit any given item of evidence.

### 5. Hearings (article 49)

The matter of objection to jurisdiction is dealt with in this article. It appears that the objection is to be taken at a stage prior to the accused pleading to the indictment. This is in accordance with the observations made above. The court will rule on the objection prior to proceeding any further with the trial.

### 6. Judgement (article 51)

It is submitted that dissenting opinions serve a purpose and they should not be shut out. A majority decision of the court will be the decision of the court. Judges must have the freedom to differ.

### 7. Appeal against judgement or sentence (article 55)

A time-limit should be provided within which an appeal should be lodged.

It is accepted that there should be a right of appeal against decisions of the court. However, in the exercise of this right, it may be provided that there shall not be a right of appeal where the accused has pleaded guilty to the indictment.

It may also be considered whether the right of appeal granted to the prosecutor could be structured in the following manner:

(a) On a question of law;

(b) On a question of fact alone or on a question of mixed law and fact with the leave of the court;

(c) On the ground of inadequacy or illegality of the sentence imposed.

## 8. Proceedings on appeal (article 56)

The procedure in the hearing of the appeals has not been provided for. Perhaps the rules of the court may make necessary provisions. It is suggested that provision be made to enable the court to receive additional evidence if it thinks necessary at the stage of the appeal.

As and when required, an appeals chamber could be constituted from the same court to hear the appeals. Judges of eminence who are appointed to the court will be competent to act in the dual capacity.

## 9. Other issues

The statute may not provide for all situations relating to investigations, institution of proceedings, indictments, trials, sentence and appeals and revisions. Therefore it is suggested that a provision be included for cases not provided for. Such procedures as the justice of the case may require and not inconsistent with the statute may be adopted in such situations.

Another matter for which provision may be made is for trial in absentia of an accused person. Having accepted an indictment, if a person wilfully evades appearing in court or wilfully does not appear in court to receive indictment, or having appeared wilfully obstructs the proceedings of the court or is unable due to ill-health or other disability to present himself in court, etc., a procedure may be stated for trial in absentia.

Since the law of evidence will figure prominently in the proceedings before the court, it may be advisable to have at least a compendium of the rules of evidence applicable in the court.

Provision may also be made to enable the court to discharge an accused person at any stage of the case for the prosecution on the ground that further proceedings in the case will not result in the conviction of the accused. The court shall record the reasons for doing so.

It will also be appropriate to have a provision to enable the court to terminate proceedings at the close of the case for the prosecution, on the ground that the evidence produced fails to establish the commission of the offence charged against the accused in the indictment. If the court considers that there are grounds for proceeding with the trial, the court shall call upon the accused for his defence.

10. Financial and other resources

As the provisions of the statute are developed, it would be important for consideration to be given to the funds and other resources that would be required for the establishment and operations of an institution such as the tribunal.

An early identification should, of course, be made of possible cost-components, e.g., such international institutional and other administrative requirements that would have to be permanently in place; and other facilities that would have to be available for use whenever necessary (e.g., investigatory, prosecutorial, judicial and incarceration, etc.).

If the tribunal were to be established as a principal or subsidiary organ of the United Nations, the manner of funding (regular budget or voluntary) would, of course, be carefully examined in the budgetary committees of the General Assembly.

If the tribunal were to be established by treaty, the provisions on funding would be some of the most important issues that would need to be satisfactorily resolved.

However, whether such a tribunal be established as a principal or subsidiary United Nations organ or as a treaty body, it would be essential (having in view the importance of securing the objectivity and integrity of the tribunal, and of the public perception thereof) that it should have independent financial viability, and, accordingly, that its funding should be self-sustaining and not dependent on government contribution.

## TUNISIA

[Original: French]

[25 February 1994]

1. Relationship of the international criminal court to the United Nations

Tunisia supports the option under which the court would be a United Nations body. This formula would give this jurisdiction the requisite authority and permanence and would ensure international recognition of its competence.

2. Applicable law

Tunisia agrees that the list of international agreements and conventions set out in draft article 22 should constitute the basis of the law to be applied by the court. Nevertheless, it believes that the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on 10 December 1984, should be added to this list.

Moreover, only a few of the treaties mentioned in article 22 define with precision the acts which they prohibit. Customary international law, which

supplements these treaties, is equally powerless to define these offences accurately. This situation could be a source of difficulty in terms of specifying, at the international level, the elements constituting an international offence so as to comply with the principle of legality, which is recognized by all criminal justice systems in the world. Accordingly, it would be advisable to expedite the work on the draft Code of Crimes against the Peace and Security of Mankind.

3. Competence

Tunisia is of the view that the competence of the court should be limited to individuals and, accordingly, should not be extended to States and international organizations, as that would be contrary to the principles of sovereignty and jurisdictional immunity of States, which are the subject of a draft convention prepared by the International Law Commission.

Furthermore, pending the completion of the draft Code of Crimes against the Peace and Security of Mankind, the subject-matter competence (competence rationae materiae) of the court could be defined by special agreements between States parties to the statute or by individual acceptance. In this way, the offences in respect of which one or more States recognized the competence of the court would be determined with the greatest possible precision. Such agreements or individual declarations could be made at any time.

Moreover, the court could be competent to try any individual, provided that the State of which he is a national and the State in whose territory the crime is committed accept its jurisdiction (this solution is similar to that proposed by the Special Rapporteur).

Lastly, the rights of the State against whose property criminal acts are committed, where such property is situated in territory other than its own, should also be taken into account (Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation and the Protocol thereto, concluded on 23 September 1971 and 24 February 1988, respectively).

4. Nomination of judges

Tunisia suggests that each State party to the statute should nominate a judge who possesses the requisite moral qualifications and competence. Subsequently, judges would be elected to the court by the General Assembly. This formula is designed to ensure the independence and impartiality of the judges, while strengthening the relationship between the United Nations and the court.

5. Structure of the court

Tunisia supports the Special Rapporteur's proposal regarding the component parts of the court, namely, the "Court" or judicial organ, the "Registry" or administrative organ and the "Procuracy" or prosecutorial organ.

6. Referral of cases to the court

Contrary to the Special Rapporteur's proposal that cases should be referred to the court solely upon complaint by States, whether or not they are parties to the statute, Tunisia is of the view that the right to refer cases to the court should also be extended to international organizations. This solution would ensure better protection of human rights.

7. Indictment

The indictment should be upheld by a Procuracy, rather than by the complainant State, as in the second formula proposed by the Special Rapporteur, in order to guarantee the neutrality and impartiality of the court.

8. Investigation

The investigation should be carried out by the court itself at a hearing. If the case is too complicated, the court could establish a special investigation commission. This choice is necessary in order to guarantee the rights of the accused and the objectivity of the investigation.

9. Fair trial

With regard to draft article 40, a general principle should be formulated relating to the enjoyment by the accused of the basic rights established by international treaty and customary law and recognized by the general principles of law.

10. Principle of legality

Two comments seem to be called for in this connection:

(a) The principle of legality, as set out in article 41, does not clearly mention one of its most important corollaries, namely, the non-retroactivity of international criminal law. Yet such a reference would appear to be essential, thus implying application of the only factor mitigating that principle, namely, the invoking of those provisions of international criminal law which are most favourable to the accused, notwithstanding the seriousness of the crimes punished.

(b) With regard to the question of international and national double jeopardy, it is quite clear that an international criminal court would be ineffectual if it could prosecute an individual guilty of a crime against the peace and security of mankind only if such acts are condemned by the law of the country of which he is a national. What would happen if countries did not include certain criminal acts in their domestic legislation? It might therefore be possible to omit a reference to the principle of double jeopardy provided that such crimes are contemplated in international treaty or customary law.

11. Applicable penalties

Tunisia supports the Special Rapporteur's proposal to leave to the court, in the absence of an international criminal code prescribing penalties, the option of referring to the law of the State of which the perpetrator of the crime is a national, the law of the complainant (victim) State, or the law of the State in whose territory the crime is committed.

However, the possibility of a crime in whose commission several persons of various nationalities participate has not been envisaged. If the court insists on referring to the law of the State of which each of the accused is a national, that could result in varying judgements and penalties, which would constitute discrimination in the treatment of the accused. In order to remedy this situation, a single system of law should be applied, preferably that of the victim State; that would ensure a measure of homogeneity in judgements and would strengthen the feeling of the victim State that justice has been fully rendered.

12. Remedy of review

The accused should be entitled to the remedy of review if a new fact comes to light which was unknown at the time of trial or appeal and which could have had a decisive impact on the judgement of the court.

13. Working languages

Draft article 18 provides that the working languages of the court shall be English and French. This provision is restrictive. The official languages of the court should be those of the United Nations.

## YUGOSLAVIA

[Original: English]

[10 March 1994]

### GENERAL OBSERVATIONS

The Government of the Federal Republic of Yugoslavia wishes to make some general observations to the very question of the need for establishing such a court and to draw the attention of the Secretary-General to the position it has already taken on this matter. In his letter of 19 May 1993 (A/48/170-S/25801), the Yugoslav Federal Minister of Foreign Affairs recognized the need for establishing a permanent international criminal court, while, at the same time, he expressed his disagreement with the establishment of an hoc International Tribunal to prosecute only persons responsible for serious violations of international humanitarian law in the territory of the former Yugoslavia. The Federal Republic of Yugoslavia considers that it is in the interest of all members of the international community to enlarge the existing system of the international legislation by such a court, which would, on the one hand, contribute to the settlement of disputes and, on the other, enable the

international community to use successfully all measures of suppression and prevention of any threatening act.

The Government of the Federal Republic of Yugoslavia wishes to advise of the following positions it has on the draft statute of an international criminal court, prepared by the International Law Commission.

Articles 1 to 4

Out of three possible ways to establish the court - by the revision of the United Nations Charter in the sense of establishing a new organ, by a General Assembly resolution or by a multilateral convention, the best solution seems to be that the court be established as an organ of the United Nations by an amendment to the Charter. In doing so, use should be made of the possible revision of the United Nations Charter to allow the expected extension of the Security Council by the admission of new permanent members so that an international criminal court could also be established by an amendment to the United Nations Charter.

The principal disadvantage of having the court established by a General Assembly resolution is in that, according to Article 22 of the Charter, it would be only a subsidiary organ of the United Nations and subordinated to the General Assembly, contrary to the principle of the independence of the judiciary which would be highly inappropriate to violate in the case of such an important court.

Apparently, the only possible solution at this moment seems to be to establish the court by a multilateral convention whereby all countries would be enabled to accede to its statute and recognize its competence for certain criminal acts, regardless of whether they are United Nations member States or not. However, even in the case of the court established in this way, it should be linked with the United Nations as much as possible either through a cooperation agreement or a provision that the General Assembly should nominate its judges and the Prosecutor.

As to the proposal in Article 4 that the court "shall sit when required to consider a case submitted to it", the Yugoslav Government would like to point out that this court should be a permanent organ whose permanence should not be necessarily reflected in holding permanent sessions. It would suffice to establish the court, with elected judges, strictly determined competence and organized judicial administration.

Articles 5 to 11

As to the structure of the court, there is no doubt that it has to have the proposed structure; however, the judicial and prosecutorial organs have to be strictly separated. As to the Procuracy, the position of the Yugoslav Government will be presented in its comments on Article 13.

The election of judges should be left to the States parties to the convention on the establishment of the court and in the case that the court is established by the Charter of the United Nations the General Assembly of the United Nations should elect the judges. Either solution would heighten the

independence and impartiality of judges and provide a firm link between the court and the States which have established it, i.e. the United Nations.

The court should also have well organized administrative organs since it will not be in permanent session but only when a case is submitted to it. The status and organization of the administrative organs should be regulated by the Rules of Procedure of the court.

The principle of the disqualification of judges is of great importance. Therefore, the reason for disqualification should be presented both by the disqualified judge and the accused. The number of judges whose disqualification is requested should not be limited, and, under paragraphs 1 and 2 of Article 11, decisions should be made in the same manner and by the same quorum.

Article 13

The functions of the Procuracy should be separated from those of the court. Since the Prosecutor has to bear the principal burden in the conduct of investigations and prosecutions, his status must be clearly determined and separated from the status of other parties which might appear before the court and the court itself. Accordingly, the election and the functions of the Procuracy should be regulated in greater detail.

The Prosecutor could also be elected by the General Assembly from among candidates from various countries who would apply under the same conditions as judges.

Furthermore, in addition to the request of a State concerned, the Prosecutor could institute proceedings himself or at the initiative of the Security Council if there is a grounded suspicion that a war crime has been committed.

Articles 15 to 18

The loss of office should be regulated in the same manner as the Statute of the International Court of Justice in The Hague. The Yugoslav Government considers it unacceptable that the loss of office is decided by the court, i.e. two thirds of judges. It is of the opinion that this brings into question the independence the Procuracy must have.

Article 19

The Yugoslav Government considers that this Article (or a number of Articles) of the draft statute should provide for the fundamental rules and general principles relating to the procedure and evidence.

Articles 22 to 26

The Yugoslav Government is in favour of having the court have ratione personae jurisdiction to prosecute only individuals.

The jurisdiction of the court ratione materiae in the cases under Article 22 of the draft statute should be obligatory for all States Parties to the statute, without providing for the possibility that the matter of the court's jurisdiction be left to the will of States and possible reservations.

If the proposal contained in Article 23 is accepted, the purpose and functions of the international criminal court will be challenged. The Yugoslav Government considers that, in order to function effectively, the international criminal court should be vested with the authority to establish criminal responsibility and enforce sanctions in a generally accepted minimum of cases, always bearing in mind the sovereignty of States. The list of crimes in Article 22 and possible supplements (e.g. as proposed in the case of mercenaries) is the optimum, in view of the structure and gravity of crimes and their consequences for which consensus of States should be obtained with respect to the obligatory jurisdiction of this court.

In this context, the court's jurisdiction for the crimes under Article 22 should not be made contingent on the consent of the State of the accused or the State in which the crime was committed, if these States are signatory to the statute.

As to the cases under Article 26 of the draft, the Yugoslav Government is of the opinion that in that case the court could have a subsidiary jurisdiction, i.e. that its jurisdiction should depend on the consent of the States concerned.

As to the possibility that the Security Council may, on the basis of its authority, submit a case to the court, the Yugoslav Government considers that the Security Council could not, in such cases, act as a prosecutor, i.e. identify certain persons as the accused. Within its competences to maintain international peace and security, the Security Council should be enabled to draw the attention of the court/the Prosecutor to the cases of aggression, while the Prosecutor will conduct an investigation and prosecution.

Article 29

Since the role of the Security Council in the commencement of prosecution before the court must differ from the role of the Prosecutor, a difference should be made between the requests submitted by States and the initial act of the Security Council. While States' requests should contain evident facts necessary for conducting criminal proceedings (identification of the accused, valid evidence, description of crimes, etc.), the initial act of the Security Council should not be corroborated in such a manner but should point to an aggression, i.e. provide an indication for the Prosecutor to conduct investigation when crimes under Article 22 of the draft are in question for which, in the opinion of the Yugoslav Government, the court should have the obligatory jurisdiction.

Articles 30 to 32

The Yugoslav Government considers that revision of a case should be provided for if the Prosecutor decides not to proceed, i.e. that this rule should not be transferred to the Bureau of the court.

Arrest and the issuance of a warrant prior to an indictment should be ordered only by Court Chambers, not by the Bureau. It would also be justified to determine the length of detention.

The indictment prepared by the Prosecutor could be submitted for discussion only to a Court Chamber which should determine whether or not a prima facie case exists.

All this indicates that, prior to an indictment by the court, there should exist a Court Chamber with the jurisdiction for all these acts.

Articles 37 and 38

Chambers of the court should be established on the basis of the Rules of Procedure to be adopted by the court not only on the basis of the members of the Bureau.

Challenges to the jurisdiction in every concrete case can be made only by the States concerned in a dispute, not by any State Party to the statute, proceeding from the principle of efficient proceedings. The accused should be also enabled to challenge the court's jurisdiction prior to the indictment by the court or the trial itself which should be the subject of the decision made by the court or a court chamber.

Article 43

The Yugoslav Government considers that paragraph (h), Article 43, is contrary to paragraph 3 (d), Article 14, of the International Covenant on Civil and Political Rights providing for the right of the accused to be present at the trial, which is one of the guarantees of the right to a fair trial. The possibility for the international criminal court to try in absentia, contrary to one of the basic international law conventions, would question the authority of the court, while the impossibility to enforce the penalty would question its efficiency. The General Assembly and the Security Council are already in the position to establish a kind of moral sanctions on the basis of their powers, so that there is no need for a court to do this.

Article 45

The Yugoslav Government considers unacceptable the possibility that the court may review a decision of the national court under Article 45, subparagraph 2 (b). If there is a grounded suspicion of the impartiality of the national court, the second-instance proceedings could be conducted before the international criminal court which would then act as an appellation court.

Article 47

Evidence collected in contravention of the relevant provisions of international law should not be taken into account nor should the court assess their validity.

Articles 55 to 57

The right to appeal against a decision of the Court Chamber should be provided both to the convicted and the Prosecutor. This right should be time-limited for both parties. However, this right of the Prosecutor could be limited (but not completely excluded) in the case of acquittal.

The Yugoslav Government considers that the Bureau, when discussing Articles 30 to 32 of the draft, should not constitute the Appeals Chamber. This matter should be regulated in advance.

The most acceptable solution would be that the appeal is decided on by all the judges in the plenary, except those who made the first-instance decision.

In view of the provision of Article 14, paragraph 7, of the International Covenant on Civil and Political Rights, the Prosecutor should not be allowed to request the revision of judgement to the detriment of the convicted, i.e. in the case of acquittal (Article 57).

Article 63

An order for the arrest and surrender of the accused can be issued only by the Court Chamber.

Extradition of persons accused of the crimes under Article 22 of the draft, provided the jurisdiction of the court is compulsory also in this case, should be obligatory as well.

In other cases, extradition should depend on whether a State concerned accepted the jurisdiction of the court. In that case, the solution in Article 63, subparagraph 3 (b) is acceptable.

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